Filed 5/17/13 In re Peter M. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re PETER M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. PETER M., Defendant and Appellant.	G046660 (Super. Ct. No. DL032955-014) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nick A. Dourbetas, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

The primary issue in this case is the admissibility of a 911 call implicating appellant in a residential burglary. Even though the caller did not testify at trial, we find her statements were admissible because they were nontestimonial and they fall within the spontaneous declaration exception to the hearsay rule. We also find there was sufficient evidence of the burglary apart from appellant's pretrial confession to satisfy the corpus delicti rule. Therefore, we affirm the judgment.

FACTS

On January 7, 2012, Luis Perez and Maria Green were living at an Anaheim apartment with their two young children. At around 9:30 a.m. that day, the family noticed an intruder in their home. While Perez struggled to detain him, Green called 911 and reported what was going on. The call transpired as follows:

"DR (dispatcher): 9-1-1 emergency.

"MG (Green): Ahhh! There's somebody in my house! [¶] . . . [¶]

"DR: How did he get into the house?

"MG: Um . . . we thought that somebody had got in here in the house, and we saw him run out but we did not know that there was somebody else in here.

"DR: There were two guys?

"MG: Yeah, but one left earlier?

"DR: Left how long ago?

"MG: Um . . . about 6:30 in the morning. But we saw him leave, like he was in the back, in the little yard in the back. [¶] . . . [¶]

"DR: Are they still in the house?

"MG: Yeah, I think he just went out the . . . window. My husband let him go or what.

"DR: Which direction was he running?

"MG: [Background screaming] [MG screams]

"DR: Ma'am, listen to my questions so we can catch the guy, okay. What direction was he running?

"MG: He's screaming. My husband was just holding him down.

"DR: Your husband's still holding him down?

"MG: Yes since he let him go, he's screaming. He has a [drug] pipe . . . . [¶] . . . [¶]

"DR: Does he have any weapons or anything?

"MG: No, I don't think so.

"DR: But you said he has a, like a pipe on him?

"MG: Yeah, like a small glass pipe on him. [¶] . . . [¶]

"DR: Does it seem like he's under the influence or something?

"MG: Yes, absolutely that he's just like [inaudible] my husband is holding him down.

"DR: Are they inside the house or outside the house?

"MG: They are outside the house right now but he jump[ed] into this little yard we have in the back through the window. [¶] . . . [¶]

"DR: So was there only one guy or [were] there two guys?

"MG: Huh?

"DR: Right now?

"MG: [Inaudible.] [¶] . . . [¶]

"DR: Okay, I've got a lot of officers on their way to help him. Is there only one guy?

"MG: Yes, only one guy, but today in the morning we had somebody just like try to get in and my husband scared him away but we did not know that one made it in the house. Until right now, my kids were telling me but I wasn't sure. I thought they were just making a [unintelligible] because they were laughing. And right now when my husband came back I told him and that guy just bursted at him right now.

"DR: Is this the same guy?

"MG: No, it's a different guy. Okay, I can hear the officers. [Inaudible] They're inside the house."

While finishing up the phone call, Green led the officers to her courtyard, where Perez was holding down a young man. The officers arrested the suspect, whose name was "Marco," and interviewed Perez and Green.[1] Then Officer Salvador Piscopo began investigating the apartment. The first bedroom he saw was empty, but the second one contained a bed, clothing and the other items, including an Xbox videogame console, which was on the floor near the center of the room. When asked at trial if the items in the room looked as though "they could have been picked up and moved about," Piscopo said yes. However, he admitted he had never been to the apartment before that one time, so he didn't know what the bedroom usually looked like.

The record does not reveal how the police came to suspect appellant was involved in the break-in. However, while Piscopo was investigating the apartment, Officer Gerard Bastiaanse proceeded to conduct a probation check at appellant's nearby apartment. Bastiaanse found appellant seated on a sofa, arrested him for burglary and took him in for questioning. When told that his partner had "ratted [him] out," appellant confessed to acting as Marco's lookout that morning. He described climbing a gate to reach the victims' courtyard and then watching Marco enter the apartment through a window. But he said he left the area after hearing rustling near the apartment.

At trial, appellant testified he falsely confessed because he felt intimidated and because he thought it would secure leniency from the district attorney. He claimed the interviewing officers directed his answers and corrected him where his story did not conform to the facts of the burglary. Appellant denied any involvement in the crime and

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1 The content of their interviews was not admitted at trial.

denied knowing anyone named Marco. However, he did admit to having previously been found guilty of petty theft and receiving stolen property in another case.

The trial court found appellant committed first degree burglary while a nonaccomplice was present. It declared appellant a ward of the court and committed him to juvenile hall for 210 days, with credit for time served.

I

Appellant contends the trial court erred in admitting the 911 tape into evidence. We disagree.

The admissibility of the 911 tape was litigated in an Evidence Code section 402 hearing before trial. Even though Green did not testify at trial, the prosecution argued admission of the 911 tape did not violate appellant's right to confront Green about her statements on the tape because they were not "testimonial" within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). And although the statements were hearsay, the prosecution argued they qualified for admission under the spontaneous declaration exception to the hearsay rule set forth in Evidence Code section 1240. The defense argued to the contrary with respect to both of these issues. It also asserted the 911 tape was irrelevant because it did not explicitly link appellant to the robbery.

However, after listening to the tape, the trial court admitted it into evidence. Explaining its ruling, the court stated the 911 tape "is a spontaneous utterance or excited utterance. Ms. Green made the phone call. You can hear what appears to be yelling at times in the background. She describes her husband in a – for lack of a better term – a struggle with the intruder, and her voice does sound excited on the tape and happening while someone is in their home. . . . [¶] As for *Crawford*, I'll find the 911 tape is not testimonial in nature and that will be pursuant to *Davis* . . . ."

Citing cases that predate *Crawford* and *Davis*, appellant argues admission of the 911 tape violated his confrontation rights because Green's statements did not

possess adequate indicia of reliability. But in *Crawford*, the United States Supreme Court abandoned the indicia of reliability test and ruled that unless the declarant is both unavailable at trial and the defendant had a prior opportunity for cross-examination, admission of the declarant's prior "testimoninal" statements violates the confrontation clause. (*Crawford, supra*, 541 U.S. at p. 59.) Nevertheless, *Davis* made clear that, irrespective of unavailability and prior opportunity for cross-examination, statements of the declarant that are "nontestimonial" are not subject to exclusion under that clause. (*Davis, supra*, 547 U.S. at p. 821.)

In *Davis*, the high court explained, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," rather than to "establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 547 U.S. at p. 822, fn. omitted; accord, *People v. Cage* (2007) 40 Cal.4th 965, 984 [statements elicited primarily for the purpose of dealing with a contemporaneous emergency are not testimonial].) Since *Davis* was decided, case law has recognized that most 911 emergency calls are nontestimonial because they are made for the "purpose of alerting the police about the situation and to provide information germane to dealing with the emergency." (*People v. Gann* (2011) 193 Cal.App.4th 994, 1008 [911 call soon after murder]; accord, *People v. Johnson* (2010) 189 Cal.App.4th 1216, 1225-1226 [911 call after victim fled scene of attempted shooting]; *People v. Banos* (2009) 178 Cal.App.4th 483, 492 [victim called police from phone booth and reported she was afraid to return home because defendant was there]; *People v. Byron* (2009) 170 Cal.App.4th 657, 675 [victim called 911 to report she had just been assaulted]; *People v. Brenn* (2007) 152 Cal.App.4th 166 [911 call immediately after victim was stabbed]; *People v. Corella* (2004) 122 Cal.App.4th 461, 468 [purpose of 911 call was to seek police assistance, not to obtain information for future prosecution].)

When Green called 911, she was surely in the midst of a serious, ongoing emergency. An unknown intruder had suddenly appeared in her house, and her husband was embroiled in a fight with him. Her children were also on the scene and potentially in harm's way. And this was the second intruder Green had seen on her property that day. Although some of Green's statements related to events that occurred earlier that morning, the dispatcher's questions were not aimed at eliciting past facts for purposes of criminal prosecution. Rather, she wanted to know where the intruder *presently* was, what the intruder was *presently* doing and whether he was *presently* alone, information which the responding officers needed to know in order to protect themselves and others at the scene. Because the primary purpose of the call was to enable the police to meet an ongoing emergency, Green's statements were nontestimonial and their admission did not violate appellant's confrontation rights.

Even so, the statements were still "subject to traditional limitations upon hearsay evidence" (*Davis, supra*, 547 U.S. at p. 821), meaning they were subject to exclusion unless a hearsay exception applied. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 291.) We agree with the trial court that Green's statements were admissible under the spontaneous declaration exception to the hearsay rule because they purported "to narrate, describe, or explain an act, condition, or event perceived by" her, and they were "made spontaneously while [she] was under the stress of excitement caused by such perception." (Evid. Code, § 1240.)

The key statements in this case related to whether there was a second person involved with the burglary. Green told the dispatcher that, besides the intruder who was presently fighting with her husband, a second person was seen on their property earlier that morning. Appellant argues Green never saw the second person but was merely told of him by her children, and therefore the personal perception requirement was lacking. (See *People v. Phillips* (2000) 22 Cal.4th 226 [it must appear with some

degree of persuasive force that declarant witnessed events to which her statements relate].) However, the record shows otherwise.

At one point during the 911 call, Green did refer to her children telling her something. But that was with regard to the fact that one of the burglars was actually in their home. With respect to what occurred at their property earlier that morning, Green said "*we* thought that somebody had got in here in the house," but "*we* saw him run out," and "*we* saw him leave, like he was in the back, in the little yard in the back." Green's repeated use of the word "we" constitutes substantial evidence she personally saw the second intruder on her property earlier that day. Therefore, the personal perception requirement was satisfied.

Appellant notes Green did not call 911 until about three hours after she made this observation. Thus, her statements to the dispatcher were not made "while [she] was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) However, as the trial court pointed out, Green clearly was under the stress of excitement later on when her family discovered Marco in their home and her husband started fighting with him. Therefore, any statement which purported "to narrate, describe, or explain" those events would be admissible. (Evid. Code, § 1240.)

Green's statements about seeing a second intruder on her property earlier that morning did help explain Marco's appearance in her home. For one thing, the statements indicated when the burglary may have begun, which shed light on how long Marco may have been in the apartment. In addition, the statements indicated Marco had an accomplice, which helped limn the potential threat he posed to the police. Because Green's statements about a second intruder related to and helped explain Marco's presence on her property, they qualified for admission under the spontaneous declaration exception. (See *People v. Farmer* (1989) 47 Cal.3d 888, 904-905, overruled on other ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 [even though gunshot

victim's statements did not describe the shooting, they were admissible as spontaneous declarations because they helped explain the shooter's motive and identity].)

Not only were Green's statements admissible under that exception, they were also relevant in that they helped connect appellant to the burglary. Green did not implicate appellant by name or description, but the fact she saw two people on her property that morning was highly probative in terms of corroborating appellant's statement he assisted Marco by acting as his lookout. Although appellant argues Green's statements were unduly prejudicial under Evidence Code section 352, and the trial court failed to weigh the probative value of the statements against their prejudicial effect, appellant forfeited these claims by failing to raise them in the trial court (*People v. Partida* (2005) 37 Cal.4th 428, 437-438; *People v. Barnett* (1998) 17 Cal.4th 1044, 1130; *People v. Anderson* (1990) 52 Cal.3d 453, 477), and the arguments fail anyway.

At bottom, we are convinced the trial court properly admitted the 911 tape into evidence. Because Green's statements to the dispatcher were relevant, spontaneous and nontestimonial, there is no basis for disturbing the trial court's decision in this regard.

II

Appellant also contends the prosecution failed to meet its burden of establishing the corpus delicti of the alleged offense. Again, we disagree.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself — i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) It is only after "the necessary quantum of independent evidence is present [that] the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Id.* at p. 1171.) However, "the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie' showing." (*People v. Jennings* (1991) 53 Cal.3d 334, 368.) So long as the evidence "permits an inference of criminal

conduct," it will be deemed sufficient, "even if a noncriminal explanation is also plausible. [Citations.]" (*People v. Alvarez, supra*, 27 Cal.4th at p. 1171.)

Appellant argues that, apart from his confession, the prosecution did not present any evidence he knew Marco or intended to aid and abet him in a burglary. However, "in a case tried on an aiding and abetting theory, the requisite knowledge and intent required for aider-abettor liability are not elements of the corpus delicti that must be proved independently of any extrajudicial admissions for purposes of establishing the corpus delicti." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128.)

The same is true for the issue of identity. Appellant notes Green never implicated him by name or description during the 911 call, and there was no independent evidence placing him at the scene of the robbery. But, as appellant admits, the corpus delicti rule does not require evidence of the defendant's identity. (*People v. Ledesma* (2006) 39 Cal.4th 641, 721.) Rather, the rule only pertains to the underlying crime itself. (*Ibid.*; *People v. Ott* (1978) 84 Cal.App.3d 118, 131, overruled on other ground in *People v. Beeman* (1984) 35 Cal.3d 547, 556.)

The underlying crime here was burglary. Appellant contends there is no evidence Marco entered Green's apartment with the requisite intent to steal, but we can infer Marco intended to steal by virtue of the fact he entered the apartment unlawfully and surreptitiously. (*People v. Matson* (1974) 13 Cal.3d 35, 42; *People v. Soto* (1879) 53 Cal. 415; *People v. Frye* (1985) 166 Cal.App.3d 941, 947; *People v. Moody* (1976) 59 Cal.App.3d 357, 363.) Moreover, Officer Piscopo testified the Xbox console in the second bedroom appeared as though it had been picked up and moved. The prosecution was not required to provide proof of a completed theft. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.) To establish the corpus delicti of burglary it only had to produce prima facie evidence of an unlawful entry and the intent to steal, which it did. Although not overwhelming, the evidence in this case was sufficient to satisfy the corpus

delicti rule. (*People v. Sullivan* (1969) 271 Cal.App.2d 531, 543; *People v. Jones* (1966) 244 Cal.App.2d 378, 382.)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.